

How should you handle 'off the record' allegations from employees who explicitly state they 'want to make HR aware' but 'don't feel comfortable' with action being taken because of a power imbalance?

Gillian MacLellan

The context



This scenario is not uncommon



You need to assess how serious the (potential) issue is and assess the legal risks involved



Potentially competing duties vis a vis different parties are involved



Balancing act between action v inaction



If your organisation operates in a regulated environment also consider whether there are enhanced obligations – there may be a duty to act



The legal issues to consider | 1

What does it mean to say “off the record”?



“Off the record” as a label has no legal standing

Without prejudice conversations

There are also statutory protected conversations – but limitations

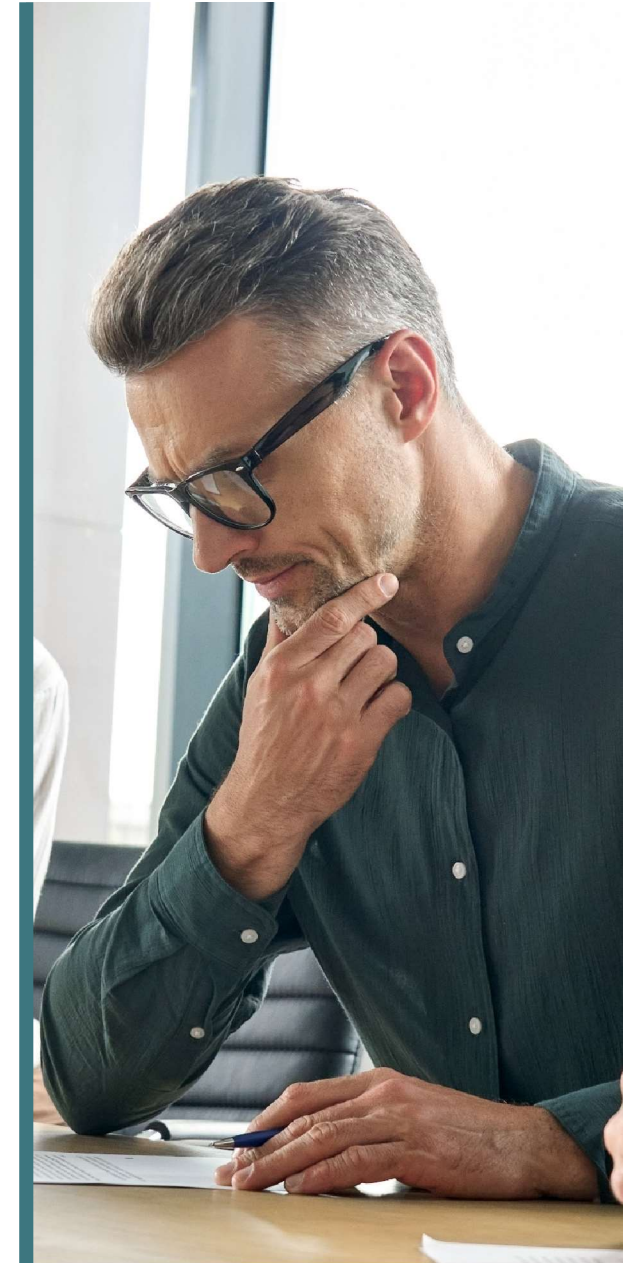
The allegations cannot be “unheard”



The legal issues to consider | 2

The duties to the complainer

- The complainer has various rights
- A key duty to consider here – duty of trust & confidence
- Constructive unfair dismissal
- Protected disclosure
- Discrimination/victimisation



The legal issues to consider | 3

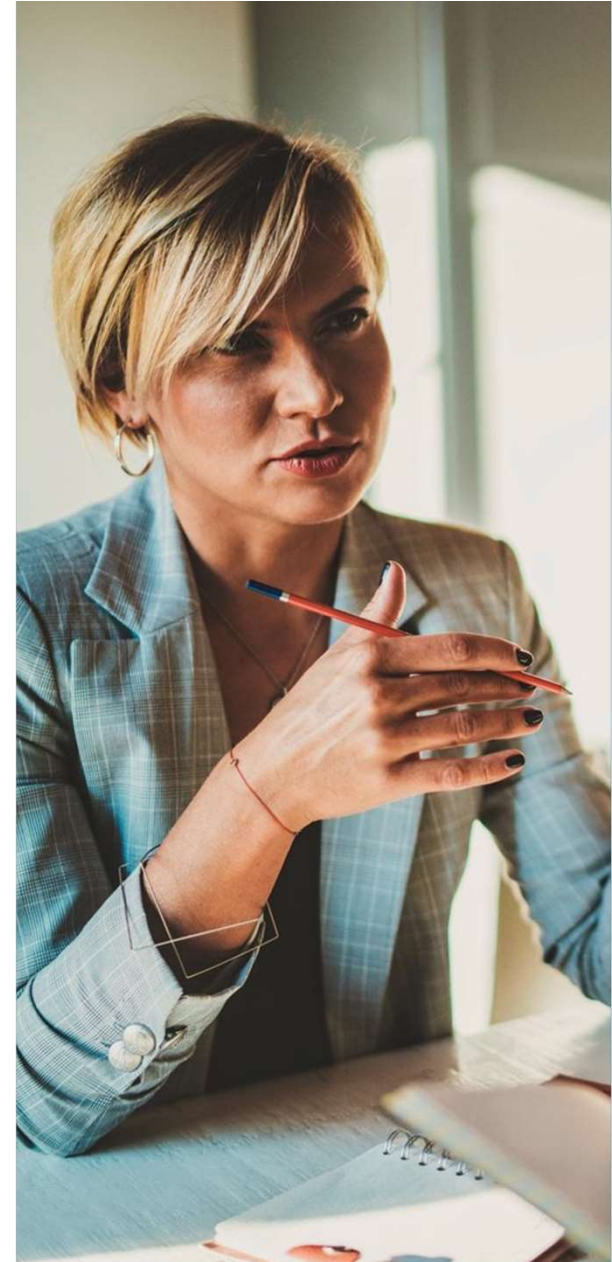
Rights of others



- Consider wider duties to other employees
 - Potential harassment
 - Duty to take reasonable care for health & safety of employees
 - New duty in relation to sexual harassment – Worker Protection (Amendment of Equality Act 2010) Act
- Consider duties to the subject of the allegations
 - Need to know case against them in order to challenge/defend

The key message

If the complaint is serious – don't do nothing



Discussion with complainer



- **Provide reassurance** relating to confidentiality of process and zero tolerance of retribution
- Do not **overpromise**
- **Understand what they want:** do they want **no** action taken or do they simply not want to be identified as the source of the allegations
- **Procedural issues:** explain difficulties with proceeding with an anonymous complaint
- **Wider duties:** explain that your duties as an employer may require you to take action

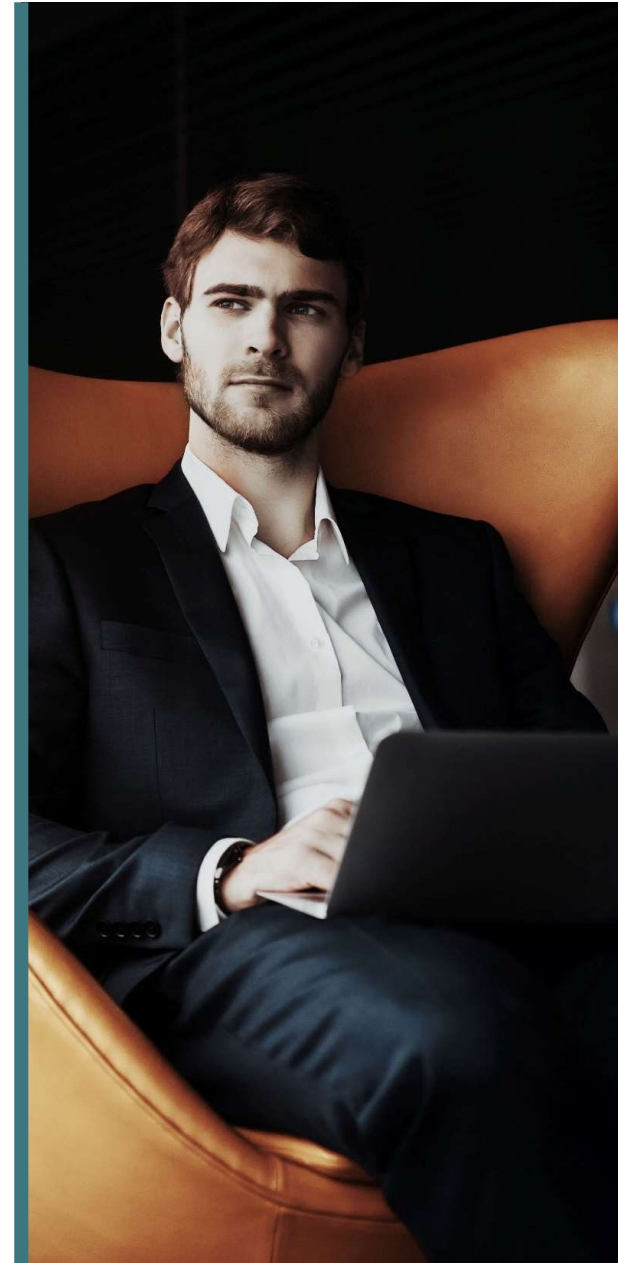
Dealing with an anonymous complaint



- Must an employer allow this?
- What considerations should an employer take into account?

The Acas guide on workplace investigations

The guide emphasises that anonymity should not generally apply – only in exceptional situations where a witness has a genuine fear of reprisals should a statement be anonymous

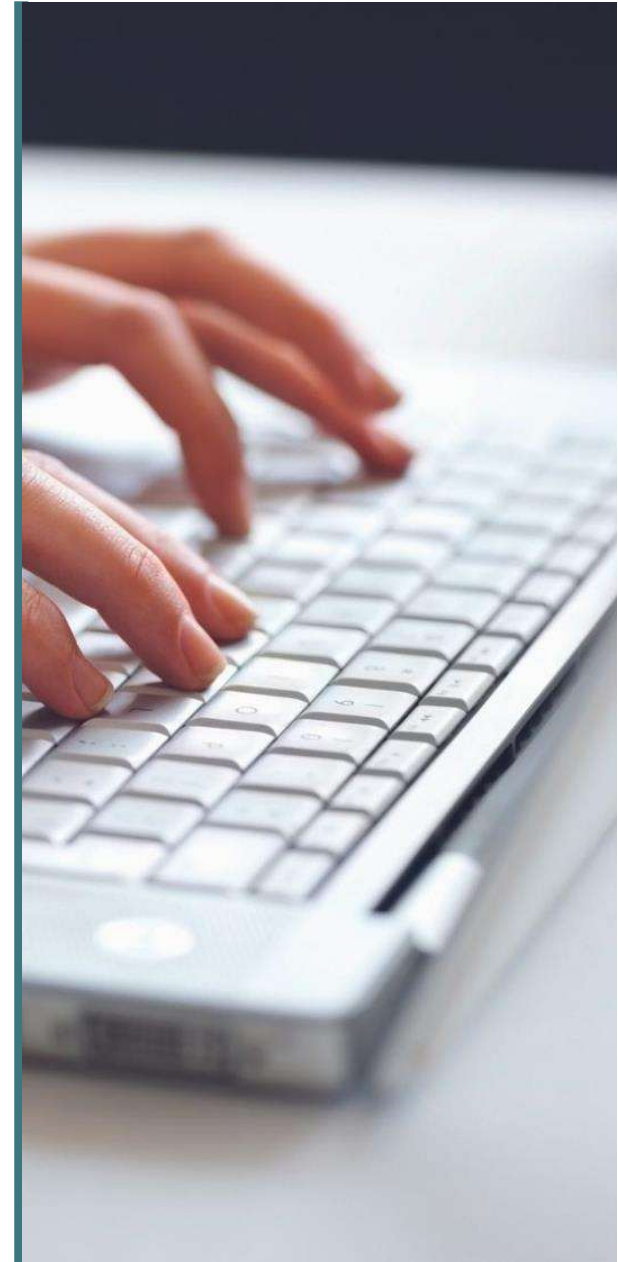


Dealing with anonymous complaint or evidence



Also consider
guidance from case
law

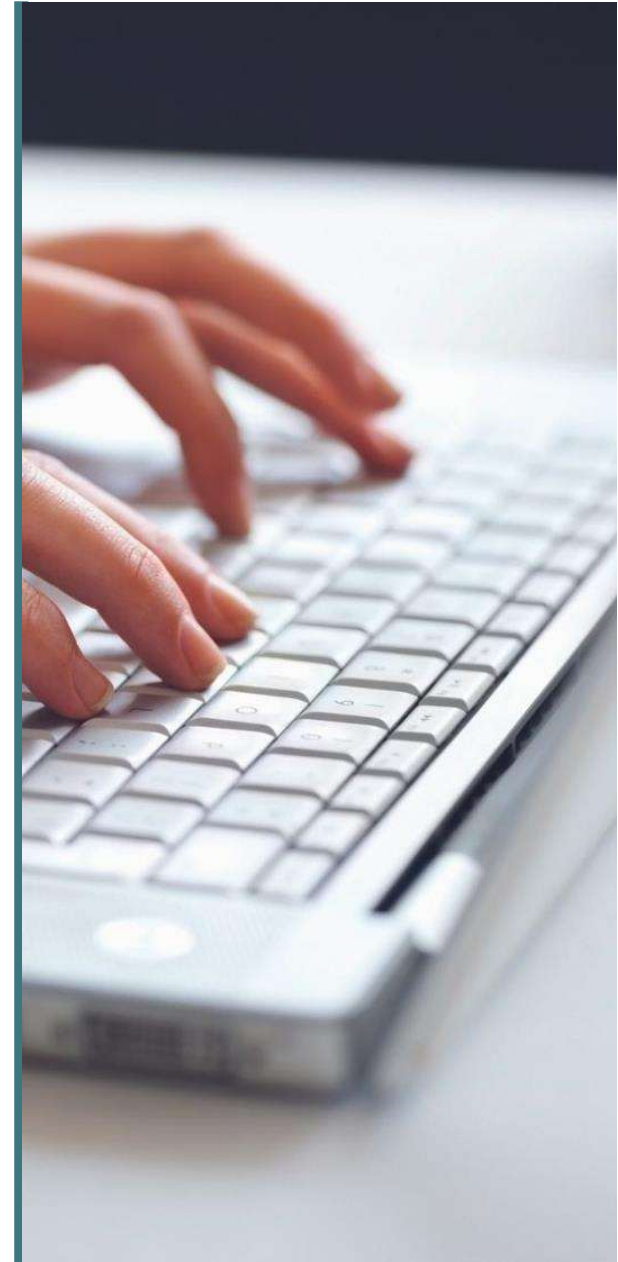
- *Linfood Cash & Carry v Thompson*
- *Ramsey v Walkers Snack Foods Ltd*
- *Woods v Acas*
- *Atif v Dolce & Gabanna UK Ltd*



Complainer wants no action taken



- An employer's response will depend on the facts, the risks involved and the employer's duties
- An employer has a duty of care towards the person who reports the complaint and to their colleagues
- Will the subject behave in that way again?
- Reputational risk if no action taken?



The EHRC technical guidance on sexual harassment



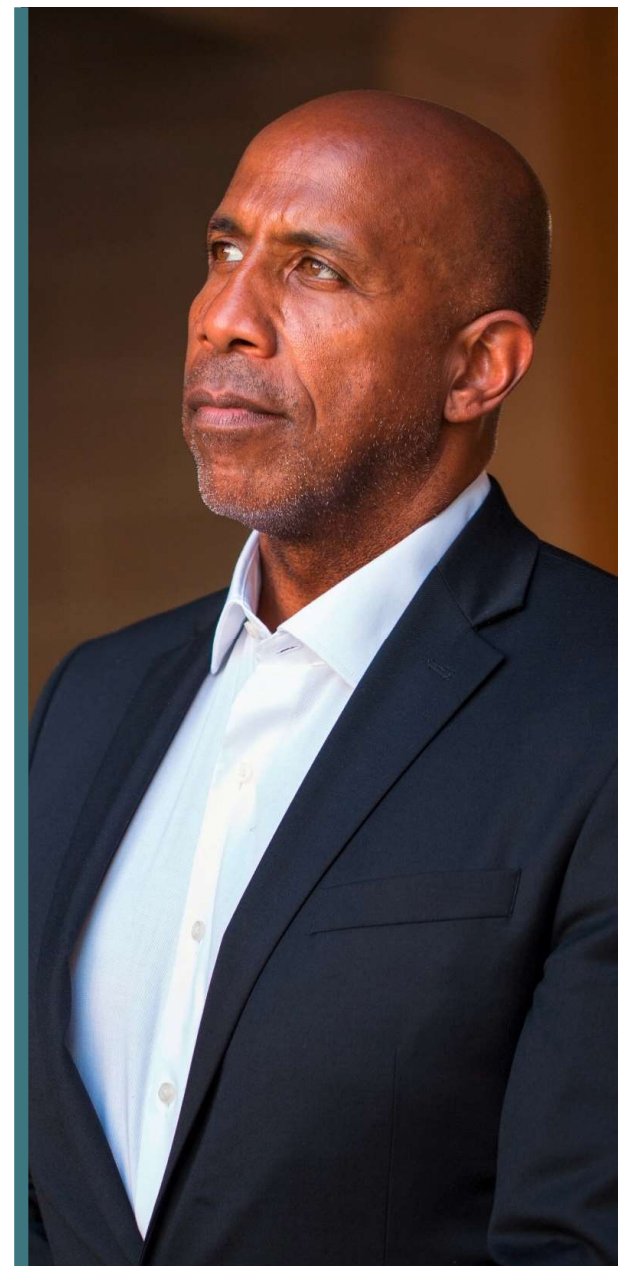
“If a worker raises a complaint with the employer but asks them not to take the matter any further, an employer should still take steps to ensure that the matter is resolved. The employer should, for example:

- keep a record of the complaint and the worker’s request to keep the matter confidential*
- encourage the worker to address the issue informally either directly themselves or with support*
- provide the worker with any necessary support and guidance on how to address the issue informally*
- keep the situation under review by checking in with the worker to find out if the situation has improved and*
- where the situation has not improved, explain to the worker that it is necessary to address the issue both for their well-being and that of their colleagues*

EHRC Guidance: When should an employer NOT follow the wishes of the complainer?

In assessing the relative risk of the options, the EHRC technical guidance says that an employer should ask:

- Have they considered and exhausted all other possible options such as those already referred to in this guidance?
- What will the impact be of overriding the complainant's wishes on them?
- What are the potential risks to the complainant, the complainant's colleagues and to other third parties if the employer does not take further action?
- Have other complaints been made against the same person?
- What is the likelihood of the matter being resolved by the complainant without intervention by the employer?



Overriding the complainer's wishes



1

- Employers should not do this lightly
- Legal risk?
 - Impact on complainer
 - Put others off coming forward?

2

Employer should do this only if the allegations are serious and after carrying out a balancing exercise

3

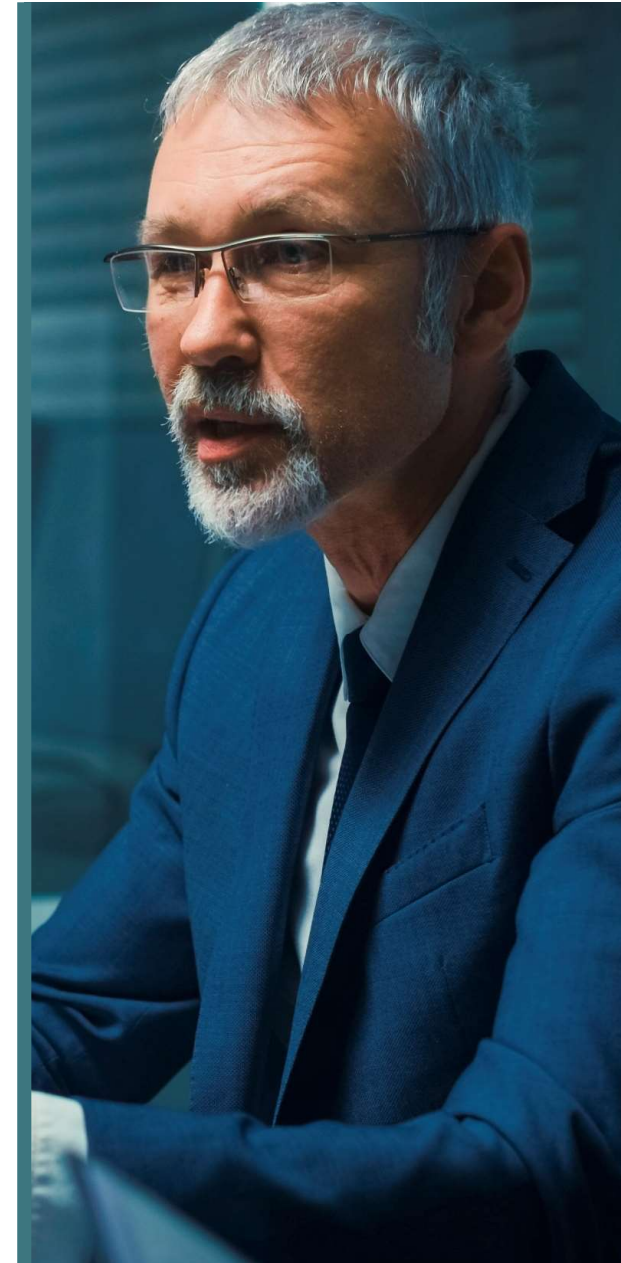
This route may impact how the issue will be taken forward - may involve the issue not being dealt with as an employee-led complaint such as a harassment or bullying complaint but a misconduct investigation

4

Ensure the complainer is supported

5

Thought should be given to ongoing contact between the subject of the allegations and the complainer – requires sensitive handling



Thinking ahead – risks of proceeding with dismissal based on an anonymous complaint/witness evidence? >>

Risk of unfair dismissal if the employee is dismissed based on evidence they cannot challenge

Burchell test

1. Did the employer genuinely believe that the employee was guilty of misconduct?
2. Did the employer have reasonable grounds on which to base that belief?
3. Was that belief formed after conducting a reasonable investigation?

Thinking ahead – risks of proceeding with dismissal based on an anonymous complaint/witness evidence? >>

Best practice is to avoid reliance on anonymous information in a dismissal situation.

If unavoidable apply safeguards from *Linfood* case – key aspects are:

- 1) a written statement should be made by the informant with any deletions to prevent identification. The statement should be available to an employee disciplined or dismissed
- 2) the motives and background of the informant should be investigated
- 3) the informant should be examined at each stage of any investigation
- 4) careful notes should be taken of all interviews with the informant

To answer the question...



- Assess how serious the allegations are
- Find out why the complainer does not want to go on the record and offer reassurance
- Assess the risk to the complainer & others of inaction v action
- Next steps
 - If the complainer does not want to take the matter forward, balance up all factors before deciding how to proceed
 - If the complainer wants proceed but remain anonymous then consider & explain the limitations
- If disciplinary allegations are supported by evidence which includes anonymous evidence, ensure that the additional safeguards are applied at the disciplinary hearing stage

If it's serious, don't do nothing

Question:

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Questions?



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